

Florida and Washington Unreasonable Delay Lawsuits
March 13, 2017 Issue Paper

Issue: EPA received two lawsuits alleging that the Agency unreasonably delayed responding to petitions filed under the Administrative Procedure Act (APA), asking EPA to establish new water quality standards (WQS) via federal rulemaking in Florida and Washington.

Request: We would like Ex. 5 - Deliberative Process

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Rationale:

Ex. 5 - Deliberative Process

Statutory Background:

- CWA § 303(c)(4)(B) provides the Administrator with the discretion to determine that new or revised WQS are necessary to meet the requirements of the CWA.
- APA §§ 553(e) and 555(b) provide that federal agencies may be petitioned for rulemaking and that agencies must respond to petitions “within a reasonable time”.
 - EPA must respond to a petition for federal WQS but can abstain from making any CWA necessity determination in such response if it provides a reasonable explanation grounded in the law.
 - Recent decision upholding EPA’s denial of WQS petition: Gulf Restoration Network petition asking EPA to promulgate numeric nutrient criteria for numerous states to protect the Gulf of Mexico. EPA denied the petition without determining whether the WQS were necessary or not, acknowledging the importance of the issue, but concluding that continuing to work with states was the best approach.

Florida Petition:

- EPA’s denial of the petition would be based on the **Ex. 5 - Deliberative Process**
- On June 18, 2009, the Florida Clean Water Network (CWN) petitioned EPA to promulgate revised human health criteria for Florida.
- In 2016, the Florida Department of Environmental Protection (FDEP) adopted new and revised human health criteria, which took effect for state law purposes in October 2016. Several administrative challenges were filed, which the state administrative law judge dismissed as untimely. That dismissal was appealed to state court where it is still pending.
- FDEP has indicated that they will await a decision in the court proceedings before submitting the criteria to EPA for review under CWA section 303(c).

- On December 28, 2016, CWN filed suit, alleging that EPA has failed to respond to the 2009 petition in a reasonable period of time, as required by the APA.
- OGC, ORC and DOJ believe that it would be beneficial to scheduling and case management if we express EPA's intent to respond to the petition within 60 days after filing a joint report to the court (filing expected 3/15/2017, therefore action by 5/14/2017). EPA would not be bound to respond by that date, however, if we fail to meet this date, a default schedule for discovery, briefs, etc. would take effect.

Washington Petition:

- EPA's denial would be primarily based

Ex. 5 - Deliberative Process

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- On October 28, 2013, Northwest Environmental Advocates (NWEA) petitioned EPA to promulgate revised human health and aquatic life criteria for Washington. NWEA argued that Washington's existing human health and aquatic life criteria were not consistent with the CWA and EPA's regulations.
- EPA took action on November 15, 2016, approving 45 human health criteria submitted to EPA by Washington, and issued a final rule that revised 144 additional human health criteria applicable to Washington's waters.
- On February 21, 2017, NWEA filed suit, alleging that EPA has failed to respond to the 2013 petition in a reasonable period of time, as required by the APA. NWEA acknowledged that Ecology and EPA addressed human health criteria for most pollutants in 2016, but noted that revised human health criteria for 3 pollutants and revised aquatic life criteria had not yet been addressed.
- EPA's answer to the complaint is due on April 24. If we can commit to responding to the petition in May, the court may be willing to stay the litigation, given EPA's plan to moot it out in the near term.